

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7280

United States Court of Appeals

FOR THE SECOND CIRCUIT

HOWARD SHEPPARD,

Plaintiff-Appellee,

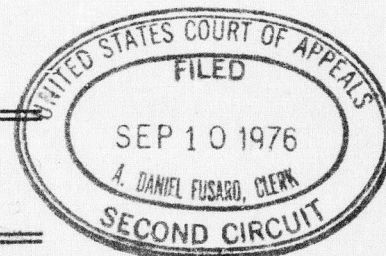
—against—

PRUDENTIAL GRACE LINES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE



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TABLE OF CONTENTS

	Page
Issues Presented for Review	1
Statement of Facts	1
Point I - The amount of damages awarded by the jury is supported by the permissible evidence	5
Conclusion	10

TABLE OF CASES

<u>CONTE v. FLOTA MERCANTE DEL ESTADO,</u> 277 Fed. 2d 664 (2d Circuit, 1960)	9
<u>NEIDLINGER v. VICTORY CARRIERS, INC.,</u> 365 F. Supp. 1376 (E.D. Pa., 1973)...	10
<u>ROSA v. A/S D/S SIENDBORG, 291 F.</u> Supp. 84 (SDNY, 1968)	9

ISSUE PRESENTED FOR REVIEW

- I. Whether the jury award of damages is supported by the evidence.

STATEMENT OF FACTS

On or about April 9, 1973, Howard Sheppard was employed on the SS LASH TURKIYE in the capacity of a First Assistant Engineer (A 32). While attending to his duties on April 9, oily slick on the deck caused him to slip and fall (A 139). Both feet went out from under him. His body twisted as to wrench his back and further fell and struck his right knee and back (A 155). At the time of the accident, Howard Sheppard was 50 years old (A 178).

After the accident, a Master's Certificate was issued to Mr. Sheppard permitting him to leave the ship to obtain medical treatment at the Public Health Hospital in New York (A 33). The doctor could not examine or render any treatment. Mr. Sheppard left New York to receive treatment at the Public Health facilities in Norfolk (A 34-35).

On April 10, 1973, the doctor at Public Health in Norfolk examined Mr. Sheppard, prescribed medication for his back pains and advised him to take hot soaks (A 35, A 199, 198).

Mr. Sheppard was marked not fit for duty because of his back (A 193) and thereafter on May 2, 1973 was advised by Public Health that he was fit for light duty only (A 192).

He was unable to return to work until June 22, 1973 (A 36). On June 22, 1973 he obtained a job standing watch as a Second Assistant Engineer on the SS NEW YORKER (A 36, 37, 40). He then joined the PRESIDENT MONROE as First Assistant Engineer for the period July 16, 1973 - July 28, 1973 (A 40, 202). Before joining the vessel, he told the Chief Engineer that he was unable to do heavy work (A 41). He then returned to the Public Health in Norfolk on August 16, 1973, unable to work for a period of sixteen days during the period July 28, 1973 through to August 28, 1973 (A 41, 197). His back pain continued (A 41, 142, 197). The pain persisted while on the GREEN WAVE during the period October 23, 1973 through January 31, 1974 (A 43) and he was unable to go to sea during the periods January 31, 1974 through to May 10, 1974 (A 43).

On August 16, 1974, Mr. Sheppard quit his job on the AZALEACITY because of the heavy work (A 44), worked

fourteen nights on shore relief jobs and returned to sea September 6, 1974 on the NEW YORKER (A 45). He left the NEW YORKER on October 3, 1974 (A 45).

On October 7, 1974, he was examined by Dr. Koven and Dr. Balensweig, complaining of constant pain (A 139, 153). Dr. Koven noted a change in the posture of the lower portion of his back due to the spasm of the muscles (A 140). He noted restriction of back motion, tenderness of lower portion of back (A 157). Dr. Koven diagnosed Mr. Sheppard's condition as a chronic sprain in the lumbosacral spine (A 157).

On November 12, 1974, Mr. Sheppard was examined at the Public Health in Baltimore (A 159). The record indicates recurrent back pain with a notation that they were trying to distinguish between a spine lesion and a compression of the nerve (A 159).

Mr. Sheppard's next job at sea was the AMERICAN RANGER which he joined on January 24, 1975 (A 45). He worked on the AMERICAN RANGER as a First Assistant Engineer to April 24, 1975 (A 45) and returned to the same ship on October 21, 1975 (A 46). Because of his back problem, he quit his job on the AMERICAN RANGER on March 29, 1976 (A 47).

Dr. Koven again examined Mr. Sheppard in early April of 1976 (A 144), noting that Mr. Sheppard complained of constant back pain since November of 1975 (A 144). In

the opinion of Dr. Koven, Mr. Sheppard's back pain was caused by his accident on board the SS LASH TURKIYE on April 9, 1973, that his condition is permanent and that he is unable to do heavy work, the best treatment consists of avoiding anything which produces additional strain, such as bending, lifting, climbing, pushing, etc. (A 146, 147). Dr. Koven is of the opinion that Mr. Sheppard should not be working as a First Assistant Engineer (A 150) especially in regard to those aspects of the job requiring strain and bending (A 148, 150).

In 1972, Mr. Sheppard earned \$27,369.98 (A 49). In 1973, he received \$27,746.59 (A 57); however, the amount is a carry over for earnings in 1972 since he worked on the SANTA ANA as a First Assistant Engineer for the period November 18, 1972 through January 19, 1973 (A 202) and was paid in 1973. In 1974, Mr. Sheppard received \$20,406.19 (A 53). However, he did not take vacation pay in 1974 (A 71,72) which he received in 1975 for 1973, 1974 and 1975 in the amount of \$9,703.90 (A 54,55). In 1975, his earnings, not including vacation pay, was \$20,406.19 (A 54).

Mr. Schamann testified as to the earnings of a First Assistant Engineer based upon the rates of base pay, overtime pay and vacation pay through to 1977, as set forth in the contract with the companies which employed Mr. Sheppard (A 91,

96, 131, 132, 134, 135, 136). Overtime pay is 91 percent of base wages (A 120).

The wages provided by contract for a First Assistant Engineer such as Mr. Sheppard on various vessels for the period 1973 through to 1977 are as follows:

1. LASH TURKIYE - 1973- \$37,806, 1974- \$41,199, 1975- \$45,261, 1976- \$48,247 and 1977- \$50,164 (A 119);
2. AZALEA CITY - 1973- \$22,480, 1974- \$30,872, 1975- \$34,088, 1976- \$36,147 and 1977- \$37,666 (A 117);
3. AMERICAN RANGER - 1973 - \$22,041, 1974-\$30,420, 1975- \$33,684, 1976 -\$35,797 and 1977- \$37,380 (A 117, 118); and
4. NEW YORKER - 1973- \$23,295, 1974- \$32,949, 1975- \$35,073, 1976- \$37,206 and 1977- \$38,777 (A 118).

POINT 1

The amount of damages awarded by the jury is supported by the permissible evidence.

A First Assistant Engineer must be able to perform a variety of jobs involved with the repair, operation and maintenance of all the ship's machinery and he is required to be capable of doing heavy lifting in the course of his normal work (Transcript-Zornes-191,192).

As a result of Mr. Sheppard's fall on the LASH TURKIYE on April 9, 1973, he has been and is unable to perform all the tasks of a First Assistant Engineer (A 41, 47, 62, 63, 146, 147, 148, 150, 162, 165). He worked periodically after his injury attempting to obtain positions which would not cause much strain

(A 41, 44, 49, 63). In 1973, he was unable to work for 89 days (A 36, 41), in 1974, 186 days (A 43, 45), and in 1975, 24 days (A 45).

As demonstrated by Mr. Schamann, the wages of a First Assistant Engineer vary based upon the class of vessel (A 95, 96). The wages are not speculative as contended by the appellants - and are based upon the rates set forth in Mr. Sheppard's contract of employment (A 116 -120, 131 - 136). Earned overtime is based upon the rate per hour for overtime and is at least 91 percent of the base monthly wage as determined by the payroll data of the companies operating vessels on which Mr. Sheppard served (A 88, 120).

In 1973, the annual earnings of a First Assistant on the LASH TURKIYE totalled \$37,806, or \$3,150.50 per month. Given this high range, Mr. Sheppard therefore was denied the opportunity of working on the LASH TURKIYE or a vessel of the same class for at least 89 days resulting in a loss of \$9,345.00 (A 36, 41, 197). In 1974, he was unable to work for 186 days (A 43, 45, 46). The monthly rates were increased in 1974 on the LASH TURKIYE to \$3433.25 (A 119), the AZALEA CITY to \$2572.75 (A 117), the AMERICAN RANGER to \$2,535.00 (A 117) and the NEW YORKER to \$2,745.75 (A 118). Averaging the earnings for employment

on these vessels, Mr. Sheppard's lost earnings in 1974 was \$2,821.68 per month, or \$94.07 per day, for a loss of \$17,497.02.

In 1975, Mr. Sheppard took his vacation which had accumulated over the years and worked only for the period January 24, 1975 to April 4, 1975, and October 10, 1975 through the end of 1975 (A 45,46). In March of 1976, he had to quit his job on the AMERICAN RANGER as First Assistant Engineer because of the strain on his back (A 47).

At the time of trial, he was 53 years of age with a work life expectancy as a marine engineer for at least twelve years. The terms of the contract set forth the wages Mr. Sheppard would have earned if he remained on the AMERICAN RANGER (A 133). The base monthly rate to June 16, 1976 - \$2,145.00, overtime rate - \$14.51 per hour (A 134). After June 16, 1976, the base wage was increased to \$2,253.30 and overtime to \$15.24 (A 134) and in 1977, an increase in the base wage to \$2,365.96 and overtime to \$16.00 (A 134).

In order for Mr. Sheppard to obtain a new job as a First Assistant Engineer, he must apply for it through the hiring hall (A 120, 123, 130, 131) which will cause him to lose at least several months of work a year (A 124, 125).

Alternatively, it is not likely that Mr. Sheppard will be able to obtain a permanent position as a First Assistant Engineer. He can perform light duty only. A company will not be disposed to hiring a First Assistant Engineer who is unable to perform all the necessary work and the number of vessels on which he may be able to work are limited (A 24).*

In any event, Mr. Sheppard is unable to work overtime which represents at least 91 percent of monthly base pay. His earning capacity is therefore further impaired. Working nine months on the AMERICAN RANGER (three months for vacation) (A 113, 117), overtime pay for April 1, 1976 to June 16, 1976, would have been \$1,952.85 per month (A 134). On June 16, 1976, overtime was increased to \$2,050.60 per month (A 134) and in 1977, the overtime will be \$2,152.72 per month or \$19,374.48 per year for a 9-month

*A Chief Engineer is responsible for the entire engine department, is required and must be able to perform all the duties and responsibilities of the engineer under him and is hired only by the company (A129). He works with tools, must be responsible in all emergency situations and does work overtime. A man such as Mr. Sheppard who is unable to perform all his duties and responsibilities as a First Assistant Engineer certainly is unable to perform those additional responsibilities as a Chief Engineer. Based on figures supplied by the appellant, Chief Engineer Joseph on appellant's vessel, the LASH TURKIYE, for the period February 16, 1973 through April 17, 1973, worked total overtime of 244 hours at \$20.82 per hour of overtime earning \$5,080.00, involving work which had to be performed throughout the ship.

year.

Clearly, plaintiff has a permanent injury to his back as a result of the accident on board the SS LASH TURKIYE. The condition is serious, it will persist and is of a permanent nature. Plaintiff's injury has altered his life style and requires him to take pain killers. The only treatment prescribed for his condition is to avoid strain. Plaintiff has a restriction in movement in the back, has muscle spasms and stiffness. There were marked restrictions of all planes of motion at the lumbosacral junction (A 140, 141, 143, 144, 145, 146, 165, 166). Certainly, plaintiff's injury is of a serious nature. As a result of plaintiff's condition, his earning power has been greatly diminished. Plaintiff has experienced a decrease in earnings and earning potential. Although no exact certainty can be formulated as to the exact amount, the evidence is sufficient to support the verdict rendered by the jury. In this case, there is no simple or easy way in which to determine the loss of earnings. It has been consistently held, however, that difficulty in ascertaining the exact amount of earning loss will not defeat or impair plaintiff's recovery.

ROSA v. A/S D/S SIENDBORG, 291 F.Supp. 84, (SDNY, 1968)

CONTE v. FLOTA MERCANTE DEL ESTADO, 277 Fed. 2d, 664

(2d Circuit, 1960); NEIDLINGER v. VICTORY CARRIERS,
INC., 365 F. Supp. 1376 (E.D. Pa., 1973).

CONCLUSION

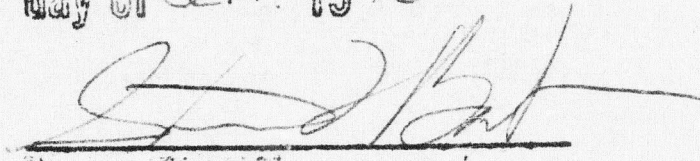
In view of the foregoing, the amount of
damages awarded by the jury is supported by the per-
missible evidence and should not be upset.

Respectfully submitted,

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STEVEN THALER
Of Counsel

Two (2) Service of three (3) copies of the within BRIEF
is admitted this 10th day of SEPT. 19 76

A handwritten signature in dark ink, appearing to be "S. Hart", written over a horizontal line.